UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

STEVENS CREEK CHRYSLER JEEP
DODGE, INC.

and

Cases 20-CA-33367
20-CA-33562
20-CA-33603
20-CA-33655

MACHINISTS DISTRICT LODGE 190, MACHINISTS
AUTOMOTIVE LOCAL 1101, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS OF AMERICA, AFL-CIO

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

The Administrative Law Judge (hereinafter "ALJ") issued his Supplemental Decision (hereinafter "SALJD") on July 29, 2009, after remand from the Board. The ALJ found an additional coercive interrogation and unlawful threat but adhered to his initial decision that Stevens Creek Chrysler Jeep Dodge, Inc., Respondent herein, did not violate the Act when it discharged Patrick Rocha on March 6, 2007 (all dates are in 2007 unless otherwise indicated). In the absence of an unlawful discharge, the ALJ also adhered to his decision that a *Gissel* bargaining order was not necessary to remedy Respondent's violations. Further, in the absence of a bargaining order, the ALJ concluded that the derivative 8(a)(5) violations should be dismissed. General Counsel files these exceptions taking issue with the ALJ's findings and conclusions regarding Rocha, the failure to find that the *Gissel* bargaining order is warranted, and the failure to find the derivative 8(a)(5) violations.

In its decision remanding the Rocha discharge to the ALJ, the Board noted that the ALJ did not discuss or appear to have considered the following thirteen items of evidence that are countervailing to his finding that Respondent made the decision to discharge Rocha for attendance and productivity reasons prior to learning of his union activities:[1]

- Rocha's early departures and extended lunches were due to Respondent's failure to assign him a sufficient number of repair orders on a regular basis;
- Garcia admitted that Rocha complained that he was not receiving enough work;

[1] The discussion in Part I with respect to the Rocha discharge is in support of the following exceptions: 4, 9, 11-13, 17-19, 22, 24-27, 33-36.

- It was accepted practice to clock out and leave early if there were no work, provided there was management permission;
- Rocha testified he was not expressly granted permission to leave only once (although he waived good-bye to Garcia who said nothing in response)– on March 2, after Respondent had assertedly decided to fire him;
- Frontella did not dispute Rocha's testimony that he would notify and obtain Frontella's permission when he left early;
- Mechanics cannot possibly cost Respondent money when they leave early due to the absence of work;
- Four of the five work orders relied upon by Respondent at the hearing as evidence of Rocha's failure to finish work on time were due to a lack of parts, and the fifth work order involved Rocha's inability to diagnose the problem, not attendance;
- Rocha testified that Garcia never counseled him or gave him a final warning about any performance/attendance issues;
- The counseling document offered by Respondent makes no mention of a final warning on February 26, and the separation report makes no reference to the alleged February 12 counseling session;
- Zaheri's written statement to the Board states that the decision to fire Rocha was made on March 5, contradicting his testimony that the decision was made on February 27;
- Respondent's position statement suggests the decision to fire Rocha was made on March 6;

- Garcia's threat, made on March 2, that he "would blow [Rocha] out" if he learned that Rocha organized the March 2 meeting is inconsistent with Respondent's testimony that the decision to fire Rocha was made on February 27;
- The separation report and the letter to the state EDD refer to "an early unauthorized departure" as a reason for Rocha's discharge, but the undisputed testimony of Rocha was that his only possible unauthorized departure occurred on March 2, after the asserted decision to fire had already been made.

The ALJ, in his Supplemental Decision, found the following with respect to these thirteen items. (1) Rocha testified that his early departures and extended lunches were due to the lack of assignments. He complained to Garcia about this, and Garcia admitted that Rocha made such complaints. (SALJD 2:46-48) The ALJ thus apparently found that Rocha's testimony was true. (2) In his initial decision, the ALJ credited Nickerson's testimony that Rocha cost the dealership time and money by clocking out early. (ALJD 9: 41-42) In his supplemental decision, the ALJ apparently backed off this finding but instead found that "while Rocha did clock out when parts were not available, parts became available shortly after Rocha clocked out." (SALJD 3:11-13) General Counsel submits this new finding is not supported by the credible evidence. See discussion below.[2] (3) In his supplemental decision, the ALJ specifically discredited Rocha's testimony that he was never counseled about performance or attendance issues and found

[2] Indeed, the evidence establishes that there were only two work orders (RO 51558 on February 6, and RO 52156 on February 21) which could possible support the ALJ's apparent finding that parts became available shortly after Rocha clocked out. And even this testimony is based solely upon the unsupported testimony of Nickerson, who has been found and conclusively established to have given material false testimony herein. Moreover, with respect to the part involved in RO 52156, Nickerson's own written summary indicates the part didn't come in until February 23, making irrelevant Rocha's early departure on February 21. With respect to the battery involved in RO 51558, the documents establish that it wasn't picked up at the vendor until 3:30 p.m., some 24 minutes after Rocha clocked out. By the time it arrived at the dealership, it would have been quitting time anyway. See discussion below.

that Garcia's contrary testimony was corroborated by documentary evidence. (SALJD 2:48-50) General Counsel submits these findings are not supported by the evidence. See discussion below. (4) As for the four documents that contradict Respondent's testimony that it made the decision to fire Rocha before it learned of his union activities, i.e., the separation notice, Zaheri's statement to the Board, Respondent's position statement, and Respondent's letter to the EDD, the ALJ ignored the Board's direction to consider these documents and explain his initial findings in light of them other than to state that he gave no weight to the separation notice. (SALJD 3:13-14) That much is obvious; not only did he give no weight to the separation notice, he gave no weight to, nor even discussed, the other documents. The issue, however, is whether his findings are unsupported by the totality of the evidence given these documents, which strongly suggest that the decision to fire Rocha was made after the union meeting on March 2. The ALJ did state that Respondent's discussion of Rocha's alleged conduct occurring after the decision to fire was assertedly made do not contradict the finding on when the discharge decision was made. (SALJD 3:1-4) The ALJ misses the mark, however, with this comment. General Counsel introduced these documents primarily because they expressly state or strongly imply that the decision to discharge was made after the union meeting on March 2; and the ALJ did not address this issue at all, contrary to the Board's instructions on remand. (5) The ALJ stated that Garcia's comment that he **"would** blow [Rocha] out" **if** he learned that Rocha organized the meeting was made under circumstances where Rocha was going to be discharged in any event. The ALJ did not explain what those circumstances were.[3] Moreover, the ALJ's supplemental findings are contrary to

[3] If those circumstances were only Garcia's testimony, eight months later, that the decision to fire had already been made, then the ALJ is engaging in bootstrapping and circular reasoning. General Counsel

commonly-understood principles of English grammar; and there is no evidence to suggest that Garcia was unschooled in the English language or inarticulate. Garcia's use of the conditional is strong evidence that the discharge decision had not been made. (6) The ALJ did not address the Board's instructions regarding the accepted practice to clock out and leave early if there were no work, Rocha's testimony that he was denied permission to leave only once, after the decision to fire was assertedly made (thereby establishing that it was not a reason for the discharge), and Frontella's failure to dispute Rocha's testimony that he would obtain Frontella's permission before leaving early, thereby discrediting Respondent's asserted reasons for the discharge and raising the issue of disparate treatment. See discussion below.

On March 2, Jim Garcia, Service Director for Stevens Creek Chrysler Jeep Dodge, Inc., Respondent herein, an automobile dealership located in San Jose, California, learned that most of his automobile technicians[4] had just met for lunch at Harry's Hofbrau with a representative of Machinist District Lodge 190, the Union herein, and had signed authorization cards. This was Respondent's first knowledge of the Union's organizing drive. (ALJD at 7, ll. 26-27.[5]) Garcia responded by immediately calling[6] Chris Nickerson, Respondent's General Manager, and embarking, as found by the Administrative Law Judge (hereinafter "ALJ" or "Judge"), upon a campaign of unlawful threats, coercive interrogations, and wage increases intended to dissuade the mechanics from supporting the Union. One of the first things Garcia did was to call Mike Lane, a

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respectfully submits that the circumstances of the meeting strongly suggest that Rocha was **not** going to be discharged in any event.

[4] The word "technician" will be used interchangeably with "mechanic" herein.

[5] References to the transcript will state: (Tr.___); General Counsel's exhibits will be identified as (GC Exh ____).

[6] This is established, despite the denials under oath by Garcia and Nickerson, by Nickerson's cell phone records which were admitted into evidence after their testimony to impeach. GC Exh. 38; Tr. 1106.

technician, into his office and question him about the luncheon, including who was there and what happened. During this meeting, Nickerson telephoned back, and Garcia repeated what he had just told Lane – that if he found out that mechanics Avelar and Rocha were behind the Union, he would "blow them away." This meeting occurred in mid-afternoon on Friday, March 2. At 8:06 a.m. on Monday, March 5, the next working day, Garcia, true to his word, had Patrick Rocha's final paycheck cut in preparation to "blow him away," which he accomplished the following morning. The ALJ appears to have uncritically accepted Garcia's testimony that Rocha was not at work on March 5 to give him his final paycheck so he terminated him instead on March 6. (SALJD 2:29-32) Zaheri's statement repeats the lie that Rocha was not at work on March 5. (GC Exh. 38) However, not only did Lane and Rocha testify about Rocha's leaving work early (at about 3:00 p.m.) on March 5 because he had no work (Tr. 147-148; 325-327, 496), and Rocha identified repair orders that he worked on that day (Tr. 496), but Service Manager Frontella admitted he had assigned work to Rocha on March 5 and the repair orders had Rocha's flag and handwriting on it indicating work that had been done on March 5. (Tr. 868-874; GC Exhs. 23 and 24) Incredibly, the ALJ ignored this compelling evidence that disproves Respondent's chronology about why the discharge did not take place until March 6.

Despite this highly suggestive timing, despite evidence of disparate treatment, and despite having discredited Garcia on nearly everything else, the ALJ, inexplicably and **without explanation,** credited Garcia's testimony that the decision to discharge Rocha had been made on February 27 before Respondent had learned of the Union's organizing drive. The ALJ so found despite the absence of even one shred of documentary evidence

supporting Respondent's contention that the decision to terminate was made before March 2. The documents that do exist, such as the Separation Notice handed to Rocha on March 6 and the letter to the Employment Development Department state reasons for the discharge that are different than those Respondent asserted at trial and indicate that the decision to discharge was made after March 2. Indeed, in a statement given to the Board during the investigation by Matthew Zaheri, Respondent's owner and the individual clearly calling the shots, **Zaheri specifically stated the decision to discharge Rocha was made on March 5!** The ALJ inexplicably failed to include this statement in his discussion of the facts or the analysis thereof despite being directed by the Board to do so.

General Counsel contends herein that the ALJ erred in concluding that Rocha was discharged not for his suspected union activities and support but for attendance problems. General Counsel contends that the ALJ erred in concluding that a *Gissel* bargaining order is not warranted herein. Such remedy is warranted by the threats of job loss and plant closure, the ongoing coercive interrogations, and the grant of wage increases to mechanics found by the ALJ to restrain, coerce, and interfere with their Section 7 rights. This remedy is even more warranted considering that the unlawful discharge of a union supporter occurred almost immediately after Respondent first learned of the Union's presence, and that such knowledge was gained through coercive interrogations throughout this small workplace. Finally, the derivative Section 8(a)(5) violations of unilateral action and failure to furnish information are necessarily established if a bargaining order is issued herein.

II. THE DISCHARGE OF PATRICK ROCHA
(Exception No. 4)

A. Introduction

The ALJ correctly found in his initial decision that the General Counsel made a prima facie showing that Respondent was motivated by Rocha's union activities in discharging him. The ALJ found: "Rocha attended the union lunch of March 2. Garcia learned that Rocha had been at the meeting. Garcia threatened to "blow out" Rocha. Rocha was discharged shortly thereafter." ALJD at 9, ll. 17-20. The ALJ then noted that the burden of persuasion shifted to Respondent that it would have taken the same action in the absence of protected activity. Despite Zaheri's statement to the Board during its investigation that he made the decision to discharge Rocha on March 5, the ALJ, **without discussing or even acknowledging Zaheri's prior inconsistent statement**, credited Zaheri's and Garcia's testimony that Zaheri made that decision on February 27. (SALJD at 2, ll. 26-27).

Respondent's testimony relied upon by the ALJ (SALJD at 2, ll. 24-39) to support his conclusion can be grouped as follows:

- Garcia counseled Rocha on February 12, 19 and 26 about his attendance problems.
- Rocha was late on February 27. Garcia contacted Zaheri and recommended discharge. Zaheri approved the discharge.
- Garcia intended to discharge Rocha on March 2 (the end of the pay period) but was delayed due to the unexpected arrival of a Chrysler factory representative. Garcia gave instructions to prepare Rocha's final check on Monday morning, March 5.

- Frontella spoke to Rocha in January 2007 about his late arrivals, his long lunches, and early departures. Frontella spoke to Garcia about Rocha's attendance the second week of February. He further also spoke to Rocha about diagnostic issues.
- Nickerson testified that Rocha cost the dealership time and money by clocking out early. (SALJD at 3, ll. 10-14, ALJD at 9, ll. 23-42)

The General Counsel respectfully submits that the evidence does not support these findings, as will be shown below.

The ALJ's findings in his initial decision that Respondent would have discharged Rocha even absent his union activities and his adherence to those findings in his supplemental decision are based solely on the testimony of Garcia, as supported by Frontella, Nickerson, and Zaheri. Not one bit of their testimony is supported by any document. The ALJ did not explain why he found their testimony credible. This is noteworthy, because he found their testimony under oath as not worthy of belief in the following instances: Frontella's denial that he told Rick Avelar, Jeff Wells and Paul Seefeld that they had to obtain union withdrawal cards before they could work(ALJD at 6, ll. 25-31); Garcia's denial that he threatened Lane with job loss and plant closure(ALJD at 6, ll. 31-43); Garcia's and Nickerson's denial that they spoke by telephone the afternoon of March 2 (ALJD at 6, ll. 43-44), testimony proven to be false by subpoenaed cell phone records; Garcia's statement to Lane that he would "blow them out" if he found Avelar and Rocha were ringleaders (ALJD at 6, ll. 44-45); Garcia's denial that he repeatedly and coercively interrogated Lane, Blanco, Seefeld, Baybayan, Wells, and Bumugat or even met with them (ALJD at 7, ll. 18-34); Garcia's denial that he agreed with Higgins that he was being blackballed because his cousin was the Union's

business representative (ALJD at 8, ll. 16-20); Garcia's testimony that he told employees their pay would be reviewed after 90 days (ALJD at 8, ll. 36-44); Nickerson's denial that he asked Rocha if he were still a union member when he was hired (Tr. 315); and Nickerson's denial that he called Lane on the cell phone and asked if Lane knew who was behind the organizing effort (ALJD at 4, ll. 8-9). In the Board's decision, Nickerson's denial that he interrogated Lane was disbelieved, and Zaheri's denial that he asked employees who paid for the pizza was disbelieved. 353 NLRB No. 132 (slip op. at 2-3) In his Supplemental Decision, the ALJ discredited Nickerson and Garcia on two more occasions. (SALJD 2:4-16) As stated above, the ALJ did not explain why he credited the unsupported testimony of Garcia, Nickerson, Zaheri, and Frontella that the decision to fire Rocha had already been made before March 2 when he discredited them on nearly everything else.

B. Credibility
Exception Nos. 4, 12, 16, 17, 19, 21, 25, 26, 30, 33-36

There are literally thousands of ALJ decisions regarding alleged discriminatory discharges published in the volumes of Board decisions. These decisions have one thing in common – the ALJs explain, often at great lengths, the reasons for their findings and credibility determinations. It is not appropriate for an ALJ to list a few facts, ignore contrary facts, and then conclude that there was or was not a legitimate business explanation for the discharge. But that is precisely what happened here. Over the years the Board, in its expertise, has identified factors relevant for evaluating the truth or falsity of the reasons asserted by an employer for an alleged discriminatory discharge. As stated above, some of these factors are timing, shifting reasons, inconsistencies, disparate

treatment, and condonation. All of these factors are present in this case, but one would not know it from reading the ALJ's supplemental decision.

In its remand decision, the Board adopted the ALJ's findings that Service Director Garcia, over his sworn denials, violated the Act on six different occasions. On remand, the ALJ discredited Garcia a seventh time and found a violation. (SALJD 2:12-16) General Manager Nickerson was found to have given false denials with respect to two unfair labor practices, once by the Board and a second time by the ALJ on remand. (SALJD 2:7-10) Owner Zaheri was found by the Board, despite his denial, to have violated the Act by asking employees who had paid for the pizza at a union meeting. These findings do not include the other examples of false testimony given by these individuals (and Service Manager Frontella – in short, all of Respondent's managers), including the perjury of Garcia and Nickerson established beyond any reasonable doubt by the cell phone records.

Nevertheless, the ALJ chose to credit Garcia and Zaheri's unsupported testimony that they made the decision to fire Rocha on February 27. The ALJ chose to credit Garcia's unsupported testimony that he had counseled Rocha in February over Rocha's denial that he had ever been counseled, despite having discredited Garcia on mostly everything else and having credited Rocha on mostly everything else. The ALJ stated that Garcia's testimony was corroborated (SALJD at 2, ll. 49-50), but, as the discussion below establishes, it was not. The ALJ chose to credit Garcia despite the existence of four Respondent documents establishing or strongly suggesting the falsity of his testimony.

Service Manager Jim Garcia was alleged in the Complaint to have committed a majority of the unfair labor practices set forth therein. His testimony is directly contrary to that of Lane, Avelar, Seefeld, Blanco, Baybayan, Rocha, Higgens, and the statements of Wells and Bumagat. The "weight of evidence" is not necessarily directly related to the number of witnesses testifying to the contrary, but, at some point, there should be some evidence, other than unsupported claims of conspiracy, to support the notion that all the other witnesses are lying.

Garcia testified that he recommended the discharge of Patrick Rocha on February 27, and that Zaheri agreed that same day. The date the decision was made is extremely significant, because no visible union activity occurred until March 2. However, Rocha was not in fact discharged until Tuesday, March 6, and Respondent can produce **no documentary evidence** to support Garcia's testimony. Garcia testified that the discharge event was Rocha's tardiness on February 27, but Rocha's Separation Notice says nothing about coming in late. Garcia claims to have counseled Rocha on February 12 about his attendance issues – Rocha denies any such meeting – but the Separation Notice makes no mention of this important meeting despite the instructions written on the form to indicate such counseling sessions. Garcia produced a document he claims to have entered on an Excel spreadsheet on February 12, but Respondent did not offer any evidence, expert or nonexpert, that the document was indeed created that day rather than, say, well after the unfair labor practice charge was filed. When asked why he wrote in "Serv. Tech" on Rother's Separation Notice (Tr.1014), or why he did not follow Nickerson's alleged instructions to write Rocha up (Tr.1041), or why the Separation Notice says nothing about coming in late (Tr.1056), or why the Separation Notice does not refer to the alleged

February 12 counseling session (Tr.1059), or why he did not request that payroll run Rocha's final paycheck first thing the morning of Friday, March 2 (Tr.1061), Garcia could only weakly respond "I don't know."

On the other hand, Garcia's recollection of what he said to Nickerson when he telephoned him the afternoon of March 2 ["make sure nobody gets hurt, there's no fighting and nobody gets hurt" (Tr.1095)] is identical to Nickerson's recollection (Tr. 923). This strongly suggests that Garcia and Nickerson conspired to give the same testimony.

There are many more instances, discussed below, of inconsistencies, contradictions, implausibilities, and weaknesses in Garcia's testimony. However, the cell phone records merit special attention. Garcia testified firmly that he knew that Nickerson did not call him back the afternoon of March 2, after Garcia called him to report the "ruckus" caused by Adamson. Three times he denied the existence of this return call, even agreeing that he was one hundred percent sure of this (Tr.1098-99), but the cell phone records proved him wrong. It is not only this blatantly false testimony that destroys his credibility, but his comical attempts to salvage something thereafter by testifying, with his recollection refreshed, that he suddenly recalled not only that Nickerson did indeed call him back but that they discussed the day's and the week's business. (Tr.1105) When challenged, Garcia recognized the absurdity of what he had just said and backed down, stating that he had no specific recollection of what was discussed in the two subsequent phone calls with Nickerson. (Tr. 1106)

Further, Garcia's testimony regarding the arrangement he had with Jason Massay also is probative on his lack of credibility. First, he testified that Massay had permission

to leave early. (Tr.1080) When asked why, Garcia said it was because he commutes three hours a day. (Tr.1080) This is very accommodating, but it casts doubt on Garcia's and Nickerson's testimony that Respondent was very busy and needed mechanics who would be at work forty hours per week. He acknowledged that Massay had never been counseled for arriving late and stated: "We have an agreement, he works approximately three 12s." (Tr.1116-17) Thus, Massay only works 36 hours per week. (Tr.1117) Then, Garcia testified that Massay's initial hours were seven o'clock to 3:30 p.m., i.e., an eight-hour day. (Tr.1117) He then backed off this and returned to his testimony that he had to work three 12-hour days. (Tr.1118) Garcia testified that, because Massay had some personal business, "I had to be flexible probably for the first 60 days." (Tr.1118) He then changed this to state that this accommodation had lasted throughout Massay's employment and that he is still accommodating him. (Tr.1119) When then asked if Massay's timecards would support his testimony that he worked three 12-hour days, Garcia admitted they would not. (Tr.1122) He then testified that he did not expect Massay to work a 12-hour day. (Tr.1122) General Counsel respectfully submits that this is not the testimony of a credible witness.

Chris Nickerson, Respondent's General Manager, was called to corroborate Garcia's account of the Rocha discharge, deny that Respondent required prospective employees to withdraw from the Union prior to being hired, and deny that Zaheri said anything unlawful in his meetings with employees. As Garcia did, Nickerson testified that there was only one telephone conversation between the two of them the afternoon of March 2. (Tr. 934) The cell phone records established the falsity of this testimony and destroyed his credibility as well.

Nickerson's return call to Garcia on March 2 is of extreme significance. Respondent's defense is based upon its unsupported claims that all of the General Counsel's witnesses lied in a conspiracy to frame Mathew Zaheri, Respondent's owner. It theorizes that the Union knew it could not win a secret ballot election (despite having authorization cards signed by nine out of the thirteen employees in the bargaining unit), so it plotted to falsely accuse Respondent of numerous serious unfair labor practices and obtain a bargaining order under *Gissel.* This plot was hatched by Richard Breckenridge but carried out by Michael Lane and Rick Avelar.

To further this theory, Garcia had to deny that he reacted to the Harry's Hofbrau luncheon by aggressively questioning employees about the luncheon. He also had to deny Lane's testimony that he asked him if Avelar and Rocha were the union organizers, followed by a threat to fire them because of it. Not only do the cell phone records prove Garcia's and Nickerson's testimony to be false, but they support Lane's testimony regarding his critical meeting with Garcia after the Harry's Hofbrau luncheon. Lane testified that, during this meeting, Nickerson telephoned and Garcia told him that Lane was there with him and he was trying to get information. (Tr. 242) General Counsel believes that, after Garcia learned of the union meeting possibly from Adamson or possibly from someone else, he telephoned Nickerson (both Garcia and Nickerson admit this). Nickerson instructed Garcia to find out whatever he could about the meeting and called back, when Lane was being questioned by Garcia, to inquire what he had learned ["I do have Mike here and I'm trying to get information." (Tr. 242)] At the end of the day, Garcia called Nickerson back, and they spoke for 14 minutes about what Garcia had learned. The cell phone records support this theory.

The phone records also support Lane's credibility. If Lane were making this all up – if he never met with Garcia in his office that afternoon, what reason would he have to go out on a limb and testify that Nickerson called Garcia in his presence? If Garcia's and Nickerson's versions were true, Respondent would be the party offering the phone records to show the absence of such a telephone call! In such case, Lane's false testimony would be demonstrated. But the facts herein are otherwise and establish Lane as the truthteller.

General Counsel respectfully submits that, at a minimum, the ALJ should explain his credibility resolutions that seemingly go against the rest of the evidence. To take the argument to the extreme, where five different authenticated videotapes show someone committing an act, it is not enough for the finder of fact to conclude otherwise simply by choosing to credit the actor's testimony coupled with a boilerplate credibility footnote. General Counsel respectfully submits that the facts herein are not that qualitatively different than this extreme example.

As argued above, the ALJ based his ultimate conclusion as to the discharge of Rocha on credibility determinations rather than an evaluation of the evidence submitted herein. It is not clear, however, whether an evaluation of the witnesses' demeanor played any part. The ALJ employed a footnote regarding credibility resolutions. (SALJD at 1, fn. 1; ALJD at 2, fn. 2) General Counsel respectfully submits that the boilerplate use of this footnote weakens its applicability. This footnote uses the term "demeanor" in general, but not in reference to any specific witness. There is no other use of this term either in either decision.

Such an approach has found recent disfavor in Board decisions, especially as the judge's findings relate to respondent's motivation. Respondent's motivation is an ultimate fact rather than an evidentiary fact. In *IBEW, Local 429*, 347 NLRB 513, 516 (2006), the Board overturned the judge's conclusion that the respondent's actions were not unlawfully motivated. The judge's conclusions were based largely on unexplained credibility determinations. The Board stated:

> The judge did not explain his basis for accepting the self-serving assertions of the Committee members on the ultimate issue, the Committee's motivation in attempting to have Page transferred to a different employer. Such self-serving declarations regarding motive are certainly not conclusive. See *Shattuck Denn Mining Corp. v. NLRB,* 362 NLRB 466, 470 (9th Cir. 1966).

Ibid. (emphasis added). Respondent's bare assertion that it fired Rocha for attendance issues is nothing more than a self-serving declaration that it discharged Rocha for motives that were not unlawful.

In *J.N. Ceazan,* 246 NLRB 637, 638 n. 6 (1979), the Board stated:

> The Board has consistently held that "where credibility resolutions are not based primarily upon demeanor ...the Board itself may proceed to an independent evaluation of credibility." *See International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 38 (Cleveland Electro Metals Co.),* 221 NLRB 1073, 1074 n.5 (1975); *Canteen Corporation,* 202 NLRB 767, 769 (1973).

The Board has further pointed out that:

> ...in any event the ultimate choice between conflicting testimony rests not only on the demeanor of the witnesses, but also on the weight of the evidence, established or omitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.

El Rancho Market, 235 NLRB 468, 470 (1978), citing *Northridge Knitting Mills, Inc.,* 223 NLRB 230 (1976) and *Warren L. Rose Castings, Inc. d/b/a V & W Castings,* 231 NLRB 912 (1977). In *El Rancho*, the Board noted that while the judge referred generally

to the demeanor factor, it did not appear that specific credibility resolutions were based on his observations of the witnesses' testimonial demeanor. *Ibid.*

In *St. Francis Medical Center,* 347 NLRB 368, 369 (2006), Member Schaumber stated the following regarding the failure by the administrative law judge to make explicit fact and credibility findings and the use of boilerplate credibility footnotes:

> Member Schaumber observes that the judge failed to make explicit fact and credibility findings in this case, a failure that created unnecessary ambiguity and reviewing difficulties. Throughout her decision, the judge cited both parties' widely conflicting versions of the facts without, in most cases, resolving those conflicts or stating which facts or witnesses she credited. See *Lewin v. Schweiker,* 654 F.2d 631, 635 (9th Cir. 1981) (courts have consistently required explicit credibility findings where such credibility is a critical factor in the decision). Moreover, in those few instances when disputed testimony was credited, the judge failed to articulate any specific reasons why one witness was credited over another. See *NLRB v. Cutting, Inc.,* 701 F.2d 659, 666-667 (7th Cir. 1983) (rejecting ALJ's credibility findings because the judge gave no reasons for crediting witnesses, and thus the findings "provide no basis for assessing the relative credibility of the witnesses"). Such unsupported findings are not cured by a boilerplate credibility statement which adds nothing to permit meaningful review. See *K-Mart Corp. v. NLRB,* 62 F.3d 209, 213 (7th Cir. 1995) (judge's "boilerplate comment concerning general credibility determinations," without further explanation, was inadequate for review)....

In *Marshall Engineered Products Co.,* 351 NLRB No. 47 (2007), the Board, in overturning the judge's credibility findings, stated that it has consistently held that it was not bound by credibility resolutions "not based primarily upon demeanor" and that the judge's findings were only partially demeanor-based. The Board stated it had "historically given less deference to the demeanor of a witness when it finds that the judge has ignored or given insufficient weight to critical evidence. See, e.g., *Braclo Metals, Inc.,* 227 NLRB 973 fn. 4 (1977)." (Slip op. at p. 2, fn. 7; p. 3, fn. 10). The General Counsel respectfully urges the Board, for the reasons expressed above and

based upon this longstanding authority, to review and consider all the evidence herein, make its findings and conclusions based upon its independent evaluation thereof, and reverse the credibility conclusions to which the General Counsel has excepted for the reasons described herein.

In this case the ALJ has ignored evidence of timing, shifting reasons, inconsistent statements, disparate treatment and condonation. The ALJ has ignored the compelling evidence contained in Respondent's own documents and position statement that Rocha was discharged for reasons different than those asserted at the hearing and that the decision was made after the Harry's Hofbrau luncheon. (See GC Exhs 15, 31, and 34.) The ALJ has ignored Zaheri's admission contained in a statement given to the Board that he made the decision to fire Rocha on Monday, March 5. (GC Exh 38) Given these omissions, the Board's opinion in *Jewel Bakery, Inc.,* 268 NLRB 1326, 1327 (1984), is especially instructive:

> The Board has not applied *Standard Dry Wall* policy so as to make inviolable an administrative law judge's credibility resolutions, including those based on demeanor. In cases in which the excepted-to credibility resolutions are in decisions which have omitted reference to relevant testimony and have mistakenly characterized the state of the record, the Board has accorded less weight to the factor of demeanor. Thus, the invocation of the demeanor factor is not a substitute for a complete review and analysis of all the record evidence.
>
> In this case, the judge's decision omitted reference to relevant testimony on critical matters, and no reasons were set forth for ignoring such testimony. Further, conclusions were based on testimony which was not placed within context. And, finally, the decision contained statements and findings unsupported by the record evidence.

C. Garcia Did Not Counsel Rocha About Attendance Problems

Exception Nos. 19, 20, 33

The ALJ credited Garcia's testimony that he counseled Rocha on February 12, 19, and 26 about attendance problems. (SALJD 2:49-50; ALJD at 9, ll. 23-24) Rocha testified that he met with Garcia only once, in mid-February, and that this was at his instigation because he was not being assigned enough work to earn a decent paycheck. (Tr. 333-36) According to Garcia, he met with Rocha on February 12 to counsel him about coming to see him if Rocha took more than a half-hour to diagnose a problem, if he ran out of work, or if he felt that a job was undersold. (Tr. 966) According to Garcia, he entered a record of that meeting on an Excel spreadsheet on his computer. (Tr. 965; GC Exh. 16) This record also states that Rocha was not to leave early unless a manager approved it. The first sentence on the record states that Garcia and Rocha talked about his not working 40 hours a week and producing only 25-26 flat rate hours.

General Counsel submits that this document is a forgery, created by Respondent after the filing of the unfair labor practice herein. In the first place, Respondent cannot document that this minute was created on February 12.[7] (Tr. 1037-40) Second, despite the alleged instructions given by Nickerson to Garcia to "write Mr. Rocha up," (Tr. 1041), Garcia did not do so.[8] When asked why he had not done so and why he did not give a copy of the report to Rocha or have him initial it, Garcia could only respond "I

[7] In Microsoft Excel, one can determine when a document was first created, last modified and last visited. (Tr. 1038) Garcia determined that the document where the minute is placed was created on January 22, 2007, and was unrelated to Rocha. (Tr. 1038) The document that was created at that time, the My Forecast document, was modified and visited after February 12. Consequently, because the minute is not a stand-alone document, Respondent cannot document that it was created on February 12. General Counsel submits that a computer expert could examine the hard drive and determine exactly when this minute was created. Respondent elected not to do this.

[8] Nickerson testified that his understanding of "write him up" means you give a copy to the employee and have him initial it. (Tr. 935)

don't know." (Tr. 1041-43) Had Garcia done so, there would be no issue about this counseling session, and Respondent's asserted reason for discharging Rocha would be more credible. The ALJ showed no hesitancy in discrediting Garcia many times; there should be no difference between untrustworthy testimony and untrustworthy testimony backed up by a unverified document created for the hearing.

General Counsel submits there is no documentation because the alleged counseling session never happened. There is no reference to it in the Separation Notice that Respondent gave Rocha upon his termination, despite Garcia' assertion that the main counseling session was held on February 12, where five issues and expectations were allegedly laid out for Rocha, and despite the instructions on the notice to fully explain the reasons for separation, including dates and descriptions of warnings, advance notice given, and efforts made to resolve problems. (GC Exh 15; Tr. 1053, 1059) When asked why he had not made reference to this alleged counseling session in the Separation Notice, all Garcia could say was "I don't know." (Tr. 1059) Garcia testified that he told Rocha on February 26 that this was his last warning. (Tr. 969) The alleged counseling session record contains an entry for February 26 – "February 26th still taking too long to diagnose a job needs to come see Jim G" – but it says nothing about a last or final warning being given; nor does the Separation Notice. The minute for February 26 does not even state that Garcia and Rocha met that day, only that Rocha needs to come and see Garcia. Despite Garcia's testimony that the discharge was precipitated by Rocha's late arrival on February 27, neither the alleged counseling session record (for either February 12, 19, or 26) nor the Separation Notice says anything about coming in late. When asked

why the Separation Notice said nothing about coming in late, all Garcia could say was, once again, "I don't know." (Tr. 1056)

One of the few things Garcia and Rocha agreed upon in their testimony was their concern that Rocha was only producing 25-26 flat rate hours each week. (Tr. 333-36) Rocha complained that he was not being given enough work and, therefore, was receiving small paychecks. It is uncontroverted that the two discussed the lack of work being given Rocha.[9] Although Garcia was Rocha's supervisor (Tr. 963), Frontella was responsible for giving work to the technicians. Despite Garcia's admission that Rocha told him he was not getting enough work (Tr. 1045) and his testimony that he instructed Rocha to see him if he was not getting enough work, Garcia never instructed Frontella, on or after February 12, to make sure that Rocha had work to do. (Tr. 1045) Garcia did not explain why he did not take this obvious step.

D. Zaheri Did Not Approve the Discharge on February 27
Exception Nos. 13-18, 27, 34-37

Respondent's stated reasons for terminating Rocha have shifted over time. The Separation Notice handed Rocha on March 5 mentions "Patrick's ability to get the work done correctly and on time" and "left early without permission did not advise anybody that he left." (GC Exh. 15) It says nothing about attendance in general nor arriving late on February 27. The explanation given to the California Employment Development Department by Respondent states "the employee was counseled about poor performance and failed to improve his performance and he left early in defiance of employer's express

[9] The problem was that Rocha was not being given work. It was not that he was taking too long to do the work he was given. This was established by Respondent's own records. Based on records provided by Respondent in Respondent's Exhibit 12, Rocha's productivity index, measured by flat rate hours divided by clock hours (Tr. 1067-68), was third highest out of five technicians in January and third highest out of seven technicians in February. (GC Exh. 26; Tr. 1067-74)

directions that he not do so." (GC Exh. 31) Respondent's position statement dated May 22, 2007, refers to a counseling session of February 12, 2007, regarding not working 40 hours a week and producing only 25-26 flat rate hours, a discussion about the same matters on February 19 including going home early, taking too long to diagnose a job on February 26, and concluding that "no correction of the problems was evident on March 6, including an early unauthorized departure." (GC Exh 34, page 4) The "left early without permission," "left early in defiance of employer's express directions," and "early unauthorized departure" referred to in the Separation Notice, letter to EDD, and position statement, respectively, can only be referring to Rocha's early departure the afternoon of March 2. (All three documents say nothing about coming in late on February 27.) Such a finding, however, would gut Respondent's position at the hearing. Zaheri furnished a statement during the Board investigation stating that the dismissal "came about from a lack of hours worked, days missed with no call and low hours produced during the months of January and February." The statement details Rocha's attendance history and concludes that he left early on February 28, March 1, and March 2: **"On the following Monday, 3/5 he did not come in or call and the decision to terminate him was made."**[10] (GC Exh. 38) Thus, the ALJ's findings are not supported by, and are inconsistent with, these aforesaid documents.

At the trial, Garcia, supported by Frontella, Nickerson, and Zaheri, testified that the precipitating event was Rocha's late arrival on February 27, resulting in the decision that day to terminate him. (Tr. 969-70) By testifying that the decision was made on February 27 because of Rocha's late arrival that day, Respondent has (1) contradicted its

[10] General Counsel submits the Zaheri statement is dispositive on the issue of when the discharge decision was made. One would have hoped that the ALJ would have discussed it and, indeed, relied on it, but he did not.

Separation Notice, EDD submission, position statement, and Zaheri's statement, (2) made irrelevant Rocha's early departures on February 28 through March 5; and (3) damaged its credibility. General Counsel believes that Respondent did this because it wanted to avoid the implications from the timing of a decision made immediately after the Harry's Hofbrau luncheon and from Garcia's "smoking gun" statement that he would "blow [Rocha] out" if he found out he was the ringleader.

Respondent had no documentation to support its testimony that the decision to terminate Rocha was made on February 27. (Tr. 1051) Garcia testified that his intent was to terminate him at the end of the week on Friday, March 2, but did not get around to it because of the unanticipated visit on Friday of a Chrysler factory representative[11] and because of the "ruckus in the shop" after lunch. (Tr. 970-71) Garcia's testimony is contradicted by the following: (1) the so-called ruckus was admitted by Garcia to last only 30 minutes (Tr.1060); (2) the Separation Notice and EDD submission refer to events occurring on March 1 and 2; and (3) Respondent's position statement and Zaheri's statement discussed above state the decision to terminate was made on March 5. Moreover, Garcia requested that Rocha's termination check be prepared at 8:06 a.m. on March 5. (Tr. 972-73, 1061; R. Exh. 25) When asked why he had not submitted such a request first thing the morning of Friday, March 2, to carry out his intent to terminate that day, Garcia could only respond: "Don't know. Procrastination, I got all day to let them know." (Tr. 1061) General Counsel submits that if Garcia intended to discharge Rocha

[11] This unnamed factory representative did not testify, nor was any document introduced to establish that such a visit did indeed occur. Experience and common sense instructs that the factory representative would have send Respondent a letter stating the results of the unannounced inspection, either pointing out encountered problems requiring correction or extending congratulations for a spotless dealership. General Counsel submits that an adverse inference should be drawn against Respondent because of its failure to offer testimony from this alleged witness, which testimony is crucial to support its alibi.

on Friday, March 2, he would have made this request first thing in the morning, before he would have been distracted by the alleged arrival of the factory representative.

E. Frontella Never Counseled Rocha About Attendance
Exception No. 19a.

The ALJ noted Frontella's testimony that he counseled Rocha about his late arrivals, long lunches, and early departures. (SALJD at 2, ll. 36-39) However, Rocha flatly denied this, testifying that the one meeting with Garcia in mid-February, at Rocha's request to complain about not getting enough work, was the only meeting he had with Respondent's managers about any work-related issue (with the exception of an early January meeting with Nickerson not relevant herein). (Tr. 333-36) Respondent furnished no document to support Frontella's testimony.

General Counsel submits that the evidence established that Respondent allowed its technicians to leave work early if they first notified a manager. (See discussion *infra.)* Because a technician received no pay or any benefit from sitting around at work with no work to do, mechanics would leave early. Rocha left early many times during his employment on occasions when he had no work to do, and he would first notify Frontella.[12] (Tr. 318). Rocha would leave early because Respondent paid its mechanics a specified sum for doing an assigned work order, and he would receive no compensation for remaining on premises with no work to do. Rocha wanted more work and complained to Garcia in mid-February 2007 about not being assigned enough work. Garcia looked at Rocha's log of hours and responded that they would have to give him more hours, otherwise he was "going to starve." (Tr. 333-35) Rocha had been

[12] This testimony was not disputed by Frontella, who admitted that there were occasions when technicians had no work to do and were permitted to clock out if they first notified him. (Tr. 865)

unemployed for nine months prior to being hired by Respondent, and this unemployment caused him financial hardship. (Tr. 308-09) Rocha needed the job, and, once hired, he needed assigned work so that he could support his family. By remaining on the clock with no work to do, Rocha not only would earn no compensation, but his productivity index would decline. Having been laid off from his previous job because of low productivity, Rocha wanted to avoid looking bad on paper due to no fault of his. (Tr. 475) Respondent never counseled nor disciplined him for not finishing assigned work in a timely manner. (Tr. 320)

F. Rocha Did Not Cost Respondent Time and Money by Clocking Out Early
Exception Nos. 8, 21, 30, 31

The ALJ found, without explanation[13], that Nickerson credibly testified that Rocha cost the dealership time and money by clocking out early. General Counsel respectfully submits that this finding is contrary to the great weight of evidence. This evidence consists of witness testimony, Respondent's production records, and the time records of other employees which indicate that, during the period in question, Respondent basically let mechanics come and go as they pleased as there was insufficient work to occupy them for forty hours per week.

[13] The only discussion of this issue by the ALJ is the following sentence: "Nickerson testified credibly that Rocha cost the dealership time and money by clocking out early." (ALJD at 9, ll. 41-42) he impliedly relied upon this testimony when he found in the supplemental decision that parts became available shortly after Rocha clocked out. (SALJD at 3, ll. 10-14) The ALJ did not discuss the substance of Nickerson's testimony. This issue was extensively litigated and is discussed in the following seven pages of this brief. General Counsel respectfully submits that the ALJ's unexplained conclusion is not supported by the evidence. General Counsel further contends that the ALJ's finding was not based upon demeanor analysis, permitting the Board to make its independent evaluation of the evidence. See discussion *infra.* In the Supplemental Decision, the ALJ finds that, although Rocha left when there were no parts available that would permit him to continue working (thereby discrediting Nickerson once more), such parts arrived shortly thereafter. (SALJD 2:12-13) This finding is not supported by the evidence. See discussion *infra.*

1. Other Employees Were Permitted to Work Less than Forty Hours

Exception No. 28

Respondent's treatment of Jason Massay is illustrative. Garcia testified that the forty-hour rule did not apply to Massay, as he made certain concessions with him "like I do with other technicians, as well." (Tr. 1080) One of these concessions was that he could work only a three-day, 36-hour week. (Tr. 1116) Respondent's accommodation of Massay's long commute may be praiseworthy, but it undercuts its contention herein that it needed its mechanics to be on premises every day. Respondent testified that some days were busier than others, and it would be short-handed if a busy day occurred on one of Massay's off days. Garcia was also flexible with Massay's arrival and departure times. (Tr. 1118) Garcia also allowed Adamson to take a longer lunch. (Tr. 1146) Neither Adamson nor Massay signed union authorization cards.

Respondent apparently was not too busy that other mechanics could not leave early. Lane left at 12 noon on February 28 to train and left at 3:45 p.m. on February 26. Blanco left at 2:12 p.m. on February 9, 3:30 p.m. on February 19, and 12:42 p.m. on February 23. Emmanuel Gonzales left four hours early on February 26 and, on a couple of occasions in late February, clocked out of his last job one or two hours prior to quitting time. Baybayan left five hours early on February 26 for training, left the premises at 3:24 p.m. on February 9, and left at 1:24 p.m. on February 20. (GC Exh. 27; Tr. 1081-91) These examples establish that other mechanics did not stay until 4:30 p.m., suggesting that the workload was not so heavy as to require their presence on the job.

Garcia attempted to draw a distinction between the treatment of these mechanics and the treatment of Rocha by claiming that the other mechanics had permission to leave

early but that Rocha did not. (Tr. 1080-83) General Counsel submits that the truth is that all mechanics who left early, including Rocha, obtained permission to leave early by notifying Frontella and hearing no objection. Various witnesses testified this was the practice. Frontella did not testify that he ever told Rocha "no, stick around, you cannot leave."

2. Rocha Only Left Early When He Had No Work
Exception Nos 7, 23

Since Respondent paid its mechanics on a flat-rate system, i.e., piece rate, it incurred no costs if a mechanic, who had no assigned work, took off early.[14] Rocha testified he would often clock out early and leave if he had no work. (Tr. 318) The evidence shows that Rocha clocked out early on January 22, 26, 29, and February 1, 2, 6, 8, 9, 12, 19, 21, and 23.[15] Garcia testified Rocha had permission to leave early on February 12. (Tr. 1043) Rocha testified he had approval to leave early a few other times for family business (Tr. 318), and this testimony was undisputed. Rocha kept a contemporaneous ledger of the Repair Orders (RO's) he worked on beginning on February 6. (R Exh. 14 ; Tr. 501) This ledger indicates he had only four RO's on February 6, of which two were "done" and two were "PH" (parts hold). On February 8 and 9, he had three RO's on each day. On February 19, the ledger lists only one RO. Rocha clocked out at 9:18 that morning; presumably, this was a day of family business for which he had prior approval. He had five RO's on February 21 (on which day Rocha

[14] The only reference to benefits offered by Respondent was a 401(k) plan. Payroll taxes are directly related to compensation paid. There is no evidence that Respondent paid any benefit or tax not directly related to compensation paid. While an absent mechanic would take up space in the garage, the evidence established that Respondent had an abundance of space, which is a fixed cost. Respondent put on no evidence that its employment of Rocha prevented it from employing another mechanic.

[15] This lists those days when Rocha clocked out before 4:00 p.m. Garcia testified that Rocha's departure on February 26 at 4:06 p.m., 26 minutes before the nominal closing time, was not a factor in this discharge, despite his claim that he gave Rocha a final warning earlier that day. (Tr. 1057)

could not complete his work because he was lacking parts – a rack and pinion on national backorder and a transmission control module – see discussion *infra)* and six RO's on February 23. All of this evidence tends to support Rocha's testimony that he left early only on days when he had no work to do (or had prior approval for family business).

Steve Rother, who worked next to Rocha, testified that Rocha would always say something like "Well, I'm going home, I don't have any work" or "they don't have any work for me." (Tr. 601) Lane testified that there were times when there was no work and that employees could leave early as long as they informed a manager. (Tr. 124, 134) Seefeld testified there were "times when there's nothing to do" and that he went home early once after telling Frontella. He assumed this was permitted since the shop was flat-rate. (Tr. 292) Avelar testified similarly. (Tr. 378) So did Baybayan. (Tr. 634) Frontella admitted this. (Tr. 865)

3. Respondent's Workload was Light in February 2007
Exception No. 32

In spite of the above, Nickerson was called to the witness chair to testify that the workload was heavy during Rocha's employment. (Tr. 894) However, Respondent's records do not support his testimony. Just as Respondent vigorously resisted the introduction of the Sprint-Nextel telephone records, which established Nickerson gave false testimony when he denied the March 2 telephone conversations with Garcia, it vigorously resisted the introduction of its production records. (Tr. 1014-17) These records established that Nickerson's testimony that January and February were busy months was no more credible than his testimony that he did not call Garcia back on March 2. Thus, the number of labor, i.e., flat-rate, hours worked by the mechanics each month were: January = 1751.49; February = 1926.72; March = 1931.32; April =

1978.60; May = 2351.98; June 2352,02; July = 2181.22; August = 2819.29; September = 2114.83. (GC Exh. 25; Tr.1018)

Respondent may contend that the proper analysis is the number of labor hours per employed mechanic. The record does not contain such an analysis because Respondent successfully resisted General Counsel's subpoena of the dates of employment of its hires; Respondent should therefore be estopped from making this contention. However, such analysis would be fallacious in any event. If Respondent were short-handed in early March when it terminated Rocha, and since there were no overhead costs in employing a low-producing mechanic as demonstrated above, and since there were plenty of stalls in the shop, it makes no sense to terminate a mechanic because his production is relatively low, because a low-producing mechanic produces more labor hours than no mechanic at all. If Respondent were as busy as it claims, it could not have afforded to let Rocha go, unless, of course, there is some other benefit to be gained, such as sending the message to the remaining mechanics that unionization will not be tolerated.

4. Respondent's Evidence Does Not Support the Conclusion That Rocha Left Early When He had Work to Do. Exception No. 22

As stated above, Rocha left early on 12 days after January 22. But Respondent contends that this affected work only on three of those days: January 23, February 6, and February 21. [Nickerson testified that the failure to complete RO 50799 on January 17 was due to a diagnostic problem, not an attendance issue. (Tr.916)] Respondent's failure to contend that any other work orders were delayed due to Rocha's attendance must mean that Respondent could not find any other examples. As it turned out, the four examples to which Nickerson testified do not support Respondent's contentions. Nickerson

testified and produced documents with respect to four work orders on three days (excluding RO 50799 on January 17) when he claimed Rocha left work early when he had work to do: RO 51029 on January 23, RO 51558 on February 6, and RO 52156 and RO 52129 on February 21. (See Respondent Exhibit No. 23.)

A great amount of testimony was offered with respect to these four work orders. With respect to RO 51029 on January 23, the record is confused, but Nickerson testified that the car could have been completed on January 26 if Rocha had not taken a 3-hour lunch. (Tr. 1362) Nickerson had to admit that he was mistaken when shown Respondent's exhibit indicating that Rocha took a 54-minute lunch that day. (Tr. 1364) Rocha testified that there was a parts issue with this car (Tr. 1310), but Nickerson insisted the parts were available. When asked how he knew, he testified that he had researched the issue. (Tr. 1366-67) In other words, we are left only with Nickerson's word, and that is the word of a witness who falsely testified that he had not called Garcia back on March 2, 2007. Not only is this incident rather remote in time, but it is premised on Nickerson's mistaken assumption that Rocha took a 3-hour lunch that day.

With respect to RO 51558 on February 6, Rocha testified truthfully that a battery needed to be ordered. (Tr. 1308) Rocha clocked out at 3:06 p.m. that day. (R. Exh. 12) Respondent introduced documents that a new battery was invoiced at the vendor's location at 3:30 p.m. that day (Tr. 1345) but could only assume it was picked up and transported to Respondents' facility later that afternoon. (Tr.1348) Rocha's ledger, written contemporaneously by Rocha before the advent of any unfair labor practice issue, indicates PH (parts hold) for RO 51558, thereby bolstering his credibility on this matter.

Nickerson testified that it was Respondent's practice to pick up the battery the same day it was ordered, but Nickerson has been shown not to be a credible witness.

This leaves only RO 52156 and RO 52129, both on February 21. Rocha testified that he had to order a transmission control module for RO 52156. (Tr. 1308-09) Nickerson testified that the part was ordered on February 21 and that it arrived on February 22. (Tr. 1352) However, Nickerson had no documents to establish that the part came in on February 22. (Tr. 1358) Inconsistently, Nickerson's written summary (R. Exh. 23, first page) states the part came in on February 23. [Moreover, Rocha clocked out at 4:30 pm on February 22. (R. Exh. 12)] An examination of the RO (R. Exh. 23) indicates that there were problems with the starter or ignition which were difficult to diagnose; Rocha ultimately found a "bad spot" on the starter and replaced it. It is very likely that this car was a "lemon" and that Nickerson was misrepresenting the facts in order to stretch this work order into an example that would support Respondent's position.

With respect to RO 52129, Rocha testified that he had to order a rack and pinion, which was on national back order due to a manufacturer's design flaw. (Tr. 1310) Nickerson, when called to rebut Rocha's testimony, said nothing about RO 52129, conceding the point. However, when testifying about this matter the first time, Nickerson, without discussing the work that needed to be done, testified that the work should have been done by February 26. (Tr. 920; R. Exh. 23) Either Nickerson's testimony was willfully false with respect to this RO, or else he did not bother to thoroughly check out the issue.

Thus, only two of these incidents have any possible relevance to Respondent's claim that Rocha left early with work to do: (1) RO 51558 on February 6 where the work order could not completed because the battery was on "parts hold," and (2) RO 52156 on February 21 where the documents strongly suggest that the delay in completing repairs on this vehicle were due to something other than Rocha's leaving late. Given that Rocha worked approximately 50 days during this ten-week period and probably worked on 300-400 work orders, these disputed incidents do not in any way dent Rocha's testimony that he remained at work if there was work for him to do.

5. Nickerson Was a Discredited Witness Whose Testimony was not Credible Exception No. 21

In short, the ALJ's apparent finding that Rocha's early departures were costing Respondent money is simply unbelievable. As stated *supra,* the ALJ impliedly relied on his finding in his initial decision that Nickerson testified "credibly" that Rocha cost Respondent time and money. (ALJD at 9, ll. 31-42) Nickerson was obviously making it up as he went along. He showed no hesitancy in testifying falsely when it would suit his purpose, as when he lied about having had telephone conversations with Garcia on March 2. (ALJD at 7, ll. 3-4; Tr. 934) Clearly, Respondent wanted to pretend that March 2 was like any other day; thus, Garcia and Nickerson had to lie about their investigation into the Harry's Hofbrau luncheon. Here, Respondent wanted to pretend that it was harmed by Rocha's absences, but the evidence is clearly otherwise.

G. Respondent's Asserted Reasons are Pretextual Exception Nos. 5, 6, 9-11, 22, 24-29

The above discussion demonstrates there is no credible evidence to support the ALJ's finding that Respondent made the decision to fire Rocha before it gained

knowledge of union activity on March 2. (SALJD at 3, ll. 2-5) The only basis for his finding is the naked testimony of Garcia, Nickerson, Frontella, and their boss, Zaheri, the malfeasors herein, all of whom are highly untrustworthy and discredited witnesses. Not only do the facts herein not support Respondent's assertion, but the assertion runs afoul of legal concepts long found to be indicative of pretext: shifting defenses, disparate treatment, and condonation. Respondent seized upon Rocha's attendance record, something that it had no concern about, and has sought to use it as pretext for its real, unlawful reason.

Zaheri, Nickerson, and Garcia have, between them, decades of experience in the retail auto industry and in running an auto repair shop. Despite this, Respondent is asking the Board to conclude that it would take steps leading to and culminating in the discharge of an employee without any corroborating documentation. General Counsel respectfully submits Respondent is asking too much. The Board has noted that a respondent's failure to produce corroborating documentary evidence supporting its claimed justification for a discharge casts doubt on its credibility:

> Furthermore, the Respondent has failed to produce any documentary evidence showing that Snow was ever notified of or disciplined for these alleged deficiencies. Indeed, the sole document provided by the Respondent to support its claims was prepared specifically by Qualls in anticipation of this litigation.

Poly-America, Inc., 328 NLRB 667, 668-69 (1999).

Not only does the Separation Notice (GC Exh 15) fail to support Respondent's position, it contradicts it. **The Separation Notice makes no mention of the event claimed to have precipitated the discharge, i.e., the late arrival on February 27.** Instead, it refers to a performance issue and one unauthorized early departure. **This lack**

of mention strongly suggests that said event was not the precipitating event. After all, what is the purpose of a separation notice but to state the reasons for the discharge? Moreover, one would reasonably expect, if Garcia were telling the truth, that the Separation Notice would refer to the alleged February 12 counseling session - but it does not. One would reasonably expect, if Garcia were telling the truth, that Garcia's spreadsheet record (GC Exh. 16) would have included something about a final warning being given on February 26 – but it does not. One would reasonably expect, if Garcia were telling the truth, that Garcia's record would have said something about attendance being discussed on February 26 - but it does not. General Counsel submits that the most reasonable conclusion of the facts herein is that Respondent jumped on Rocha's early departure on March 2, as an excuse to fire him and that its real reason was the advent of union activity among its mechanics, of which it had just learned. What better moment to send a message to the other mechanics that trying to organize is hazardous to your financial health! The evidence shows that Respondent has not disciplined employees for leaving early when they had no work and, further, that Rocha only left early under such conditions.

As discussed above, Respondent's asserted reasons for Rocha's discharge as well as the date upon which it claims the discharge decision was made have shifted over time.. One would expect the reasons stated in the Separation Notice to be the truest statement of the reasons for discharge, but the Separation Notice herein has little resemblance to the reasons asserted at trial. The statement given to the EDD (GC Exh 31) is consistent with the Separation Notice but not with Respondent's trial testimony. The same can be said about Respondent's position statements (GC Exh 34) submitted to the Board and the

statement that Zaheri prepared and gave to the Board. (GC Exh 38) These reasons focused on Rocha's early departure on March 2 and his claimed no-show on March 5 [Respondent's own documents establish Rocha was at work on March 5 – see GC Exh 23 and 24]. But Respondent was concerned about the timing of the discharge right after the Harry's Hofbrau luncheon; therefore, it fabricated a new reason for the discharge – arriving late on February 27 – to avoid the issue of timing.

It is black letter law that shifting reasons or justifications for a discharge "constitute relevant and even compelling evidence of unlawful motive" and "severely undermines [the employer's] credibility..." *NLRB v. Dorothy Shamrock Coal Co.,* 833 F.2d 1263, 126 LRRM 3313, 3317 (7th Cir. 1987), citing *NLRB v. Rich's Precision Foundry, Inc.,* 667 F.2d 613, 626 (7th Cir. 1981). See also *Enjo Architectural Millwork,* 340 NLRB 1340 (2003); *Southern Pride Catfish Co.,* 331 NLRB 618, 620-21 (2000); *Poly-America, Inc.,* 328 NLRB 667, 668-69 (1999); *Sound One Corp.,* 317 NLRB 854, 858 (1995). This is also true for inconsistent reasons articulated in a respondent's position statement before the Board. *Black Entertainment Television, Inc.,* 324 NLRB 1161, 1161 (1997).

Respondent's treatment of Jason Massay, Ron Adamson, and other employees discussed above is relevant to show that Respondent did not require employees to be on premises forty hours a week. Respondent had an interest in seeing that its customers' vehicles were serviced properly and promptly. It had no interest in requiring mechanics to sit around the shop when they had no work to do. General Counsel submits that the weight of the evidence supports the factual conclusion that Rocha engaged in no misconduct in Respondent's eyes when he took extended lunches (like Adamson) or went

home early. Respondent claims otherwise. To the extent that Rocha is considered to have engaged in misconduct, Respondent's more lenient treatment of Massay, Adamson, and other employees by not requiring them to be at work a full forty hours constitutes unlawful inconsistent or disparate treatment of Rocha, whom it suspected of being one of the two union ringleaders.

Finally, if one were to suspend disbelief and take Respondent at its word, it is clear that Respondent had condoned Rocha's early departures and long lunches, only to respond with discharge upon the intervening event of the Harry's Hofbrau luncheon on March 2. Garcia claims he counseled and warned Rocha about attendance on February 12. Yet, he took no action when Rocha took lunch breaks of 3, 1.3, and 2.5 hours on February 13, 15, and 16, respectively. Nor did Garcia take any action when Rocha took long lunches the week of February 19 and left at 9:18 a.m., 2:30 p.m., and 3:06 p.m. on February 19, 21, and 23, respectively. Garcia states he gave Rocha a final warning on February 26 but took no action when Rocha took a 3.1 hour lunch that day. According to Respondent's records, Rocha worked only 22.45 hours the week of January 29 and 32.8 hours the week of February 5. (R. Exh. 12) The ALJ, by including every instance when Rocha left at any time before 4:30 p.m., found that Rocha left early 29 out of 30 days between January 22 to March 2. (ALJD at 5, ll. 44-45) What employer would tolerate such early departures if it were something that mattered to the employer? The answer clearly is that no employer would.

In *Webco Industries,* 334 NLRB 608, 609 n. 5 (2001), the Board described the typical condonation case "in which an employer tolerates an employee's misconduct until union activity begins, and then discharges him, assertedly because of the previously

tolerated misconduct. In such cases, the only intervening event is the union activity." In such cases, the Board finds that the intervening event is the true reason for the discharge. In this case, Respondent tolerated Rocha's long lunches and early departures. It was only after Respondent learned of the union organizing effort that his attendance became an issue. His final check was prepared the morning of the next working day after Respondent gained such knowledge. General Counsel submits that this case fits the pattern of a typical condonation case.

Having found that the General Counsel established a prima facie case of discrimination herein, the ALJ noted that the burden of persuasion shifted to Respondent. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must "persuade" that the action would have taken place absent the protected conduct "by a preponderance of the evidence." *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). If an employer fails to satisfy its burden of persuasion, a violation of the Act may be found. *Id.*, citing *Bronco Wine Co.*, 256 NLRB 53 (1981).

If the employer advances reasons for its actions which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp., 255* NLRB 722 (1981), enf'd 705 F.2d 799 (6th Cir. 1982). In the leading case of *NLRB v. Shattuck Denn Mining Corp., supra,* the Ninth Circuit explained the reasoning behind this rule of analysis:

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-

> serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact- here the trial examiner-required to be any more naive than is a judge. (Footnote omitted.) If the finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal- an unlawful motive- at least where, as in this case, the surrounding facts tend to reinforce that inference. Here was a new union, just certified, and quite busy in advancing grievances; here was an officer of that union who was also a shop steward and an active member of the grievance committee; here was such an employee presenting a grievance, on his own behalf, against his supervisor. The inference that his discharge was motivated by a desire to discourage such union activity is by no means without basis. It seems to us a reasonable one to draw.

General Counsel respectfully submits that this rule of analysis and its underlying rationale apply with full force to Respondent's shifting justifications. This point was explained by the Supreme Court in a ruling under the federal employment discrimination laws:

> ...In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover-up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."...Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000).

The ALJ found that Garcia, on March 2 right after learning about the Union, threatened to "blow out" Rocha if he was behind the union organizing drive. (ALJD at 7, ll. 3-9) The ALJ noted that this type of threat "is the ultimate threat an employer can convey to an employee." But the ALJ, in neither his initial nor supplemental decisions, did not delve into the inconsistency between this finding and his finding that the decision to discharge Rocha had already been made. Why would Garcia use the conditional tense

("I'll fire Rocha if he is behind this") if the discharge had already been made? Garcia's statement says nothing about Rocha already being on his way out and even implies that he is not. Why would he not say something like: "I'd fire Rocha if he is behind this except he's already being fired" or "I hope Rocha's the ringleader, because he's on his way out." General Counsel submits the reason is obvious – the decision to fire Rocha had **not** already been made. On the basis of the facts herein and the applicable law, General Counsel respectfully submits that the Board should conclude that Respondent discharged Rocha because of his union activities in violation of Section 8(a)(3) of the Act.

III. A GISSEL BARGAINING ORDER IS AN APPROPRIATE REMEDY BASED UPON THE ALJ'S FINDING OF FACTS EVEN WITHOUT ANY JOB LOSS RESULTING FROM RESPONDENT'S UNFAIR LABOR PRACTICES (Exception No. 38

Under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), the Board, as the ALJ noted, may issue a remedial bargaining order, absent an election, in two categories of cases. The first category is "exceptional" cases, those marked by "outrageous" and "pervasive" unfair labor practices. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine the majority strength and impede election processes." *Gissel* at 614. In such cases the rational for granting a bargaining order is that the "possibility of erasing the effects of past practices and ensuring a fair election... by use of traditional remedies, though present, is slight and ...employee sentiment once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." Id. In making this decision, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the

violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. *Intermet Stevensville,* 350 NLRB No. 94 (2007), citing *Abramson, LLC,* 345 NLRB 171, 176 (2005). The General Counsel submits that this case falls squarely within the second category.[16]

The ALJ based his decision not to grant a *Gissel* bargaining order on the grounds that "no employee lost employment as a result of Respondent's unfair labor practices," citing *Hialeah Hospital,* 343 NLRB 391 (2004). (SALJD at 4, ll. 5-6) Although exception is taken to this factual finding, General Counsel urges that significant evidence exists to warrant a bargaining order even without any such loss of employment. The record of the case shows that Respondent was guilty of several hallmark violations as well as several non-hallmark violations, which were both numerous and serious, which serve to make a fair election nearly impossible.

In *Evergreen America Corp.*, 348 NLRB 178 (2006), enf'd 2008 U.S. App. LEXIS (4th Cir. June 26, 2008), the Board found that three hallmark violations accompanied by several non-hallmark violations, even without any loss of employment, were sufficient to warrant the issuance of a bargaining order. The Board came to this conclusion based upon the fact that the hallmark violations found (beneficial wage increases, promotions, and threats of plant closure and job loss), combined with numerous and serious non-hallmark violations (unlawful interrogations, solicitation of

[16] A prerequisite for a *Gissel* bargaining order is a demonstration through competent evidence that the Union was supported by a majority of bargaining unit employees. The ALJ so found. (SALJD at ll. 1-3. . The ALJ, in his supplemental decision, did not note the number of card-signers, but correctly found in his initial decision that nine mechanics signed authorization cards (ALJD at 3, ll. 1-2); and the evidence established that the bargaining unit consisted of thirteen technicians (Tr. 18-19). If the service advisors are part of the appropriate unit, then ten out of sixteen unit employees signed authorization cards (Tr. 18-19; GC Exh 13).

grievances, and creating impression of surveillance) made it unlikely that a fair re-run election could be possible based on the lasting effects of the violations. The Board pointed out that the violations affected the entire bargaining unit, emanated from upper management, and persisted during the postelection period. In *Gerig's Dump Trucking*, 320 NLRB 1017, 1018 (1996), the employer's president and co-owner made threats of business closure and job loss as well as promises of increased benefits for the unit employees after they renounced the union. The Board found that the seriousness of the respondent's unfair labor practices warranted the issuance of a bargaining order. In *Color Tech*, 286 NLRB 476 (1987), the Board issued a bargaining order where the employer solicited grievances, impliedly promised benefits, granted wage increases, and promoted and supported an anti-union letter circulated by anti-union employees. The Board noted that the centerpiece for the bargaining order was the grant of wage increases. Id. at 477. In *Red Barn*, 224 NLRB 1586 (1976), the Board issued a bargaining order because the employer conducted detailed and coercive interrogations and granted new group health and life benefits.

The instant case has several similarities with *Evergreen America Corp* and the other cases cited above. Two hallmark violations – threats of plant closure and job loss and the grant of wage increases – are present herein. The ALJ found that Respondent had unlawfully threatened plant closure and job loss. The Board has found such threats to be "among the most serious of unfair labor practices" which support the issuance of a bargaining order. See *MJ Metal Products*, 328 NLRB 1184 (1999). The ALJ found that Garcia, the Service Director, made multiple threats of plant closure. Garcia threatened that the shop would never become union and that Zaheri, the owner, would shut the doors

if such did occur. ALJD at 6. Additionally, Garcia threatened employees with termination many times; he threatened that people would get in trouble, lose their jobs, and heads would roll if the shop became union. Garcia further threatened that he would "blow them out" if he found employees organizing. Id. at 6.

The ALJ found (and the Board agreed) that Respondent unlawfully granted wage increases to unit employees to dissuade them from supporting the Union. The Board considers such increases to be hallmark violations because of their "particularly long-lasting effect on employees" and "difficult[y] to remedy by traditional means." *Evergreen,* slip op. at 4. As stated in *Gerig*, such unlawfully-granted benefits serve as reminders to the employees that it is the employer, not the union, that is the source of such benefits, and that such benefits may continue as long as the employees do not support the union. *Gerig, supra* at 1018.

In addition to these hallmark violations, the ALJ found (and the Board agreed) that Respondent committed other violations which were both numerous and serious. These violations affected all or nearly all of the bargaining unit, especially those employees who had signed authorization cards, a factor which has been found to be particularly supportive of the issuance of a remedial bargaining order. See *Evergreen, supra*; *Cogburn Healthcare Center*, 335 NLRB 1397, 1399 (2001). The ALJ found that Respondent coercively interrogated Blanco (repeatedly), Lane, Seefeld (repeatedly), and Baybayan. The evidence also establishes that Garcia coercively interrogated Wells and Bumugat. (Tr. 630-31, 666; GC Exh. 20) In addition, the Board found that Nickerson coercively interrogated Rocha and Lane and that Zaheri coercively interrogated the technicians at a group meeting.

The ALJ also found (and the Board agreed) that Respondent, by General Manager Nickerson and Service Manager Frontella, told Avelar, Wells, and Seefeld that they had to obtain a union withdrawal card before they could work for Respondent. Soliciting and requiring employees to withdraw from the union as a condition of employment not only violates Section 8(a)(1) of the Act, as the ALJ found, but the logical implication thereof is that one will lose one's employment if they regain their union membership. After all, this is the literal meaning of a condition of employment. General Counsel respectfully submits that this unfair labor practice is a hallmark violation under *Gissel.*

As discussed above, the evidence establishes that Respondent also unlawfully created the impression of surveillance of the employees' union activities, solicited grievances to dissuade employees from supporting the Union, and made statements that attempts to secure union representation would be futile. These additional acts of interfering with employees' Section 7 rights warrant the issuance of a *Gissel* bargaining order.

In determining whether to issue a bargaining order, the Board also considers the size of the unit, the extent of dissemination of the unfair labor practices among employees, and the identity and position of the individuals committing the unfair labor practices. All of these factors warrant the issuance of a bargaining order herein. The unit is very small, thirteen in number, and some or all of the unfair labor practices affected all of the technicians. Dissemination, therefore, was to the entire unit. The malefactors herein were every manager and supervisor in the line of authority from Service Manager Frontella to Service Director Garcia to General Manager Nickerson to Owner and President Zaheri. The Board has found that the smaller the unit, the greater the impact of

the unlawful conduct, especially where such unlawful conduct is pervasive throughout an employer's entire management structure. *Big Horn Beverage*, 236 NLRB 736, 754 (1978).

In these circumstances, where Respondent has committed hallmark and other serious unfair labor practices, traditional Board remedies are unlikely to make possible a fair re-run election. Respondent engaged in a massive and blatantly unlawful response to employees' organizational activities. Respondent's combination of pre-election threats of plant closure, employee terminations, and nearly across-the-board wage increases to a relatively small bargaining unit have a particularly coercive and lasting effect that will linger for an extended period of time. Such conditions make it highly unlikely that a fair and free election, untainted by coercion, can be held. This case warrants a remedial bargaining order.

IV. IN THE EVENT THE BOARD FINDS A BARGAINING ORDER IS NOT WARRANTED BASED ON THE ALJ'S FINDINGS, SUCH REMEDY WOULD BE APPROPRIATE WHEN THE UNLAWFUL DISCHARGE OF ROCHA IS CONSIDERED

Exception No. 38

The Board has consistently found a retaliatory discharge based upon union activity to be a hallmark violation warranting a remedial bargaining order. See, e.g., *Adam Wholesalers Inc.*, 322 NLRB 313, 314 (1996). As stated in *Adam Wholesalers*, such action demonstrates to employees that respondent is willing to carry out its threats and reinforces the employees' fear that they would lose employment if they persisted in union activity. Id. at 314. General Counsel respectfully submits that the ALJ erred in his conclusion that the discharge of Patrick Rocha did not violate the Act and that he erred in finding that Rocha would have been discharged even absent his union activities.

When considered together with Respondent's other hallmark and pervasive violations herein, it is clear that traditional Board remedies are insufficient to correct the damage done to the employees' Section 7 rights. The possibility of erasing the effects of the Respondent's unfair labor practices is slight and holding a fair election unlikely; thus a bargaining order is the correct remedy.

V. CONCLUSION
Exception Nos. 57, 58

For the reasons stated above, General Counsel respectfully urges the Board to find that Respondent committed additional violations of Section 8(a)(1) of the Act as contended herein and that it discharged Patrick Rocha and refused to hire Mark Higgins in violation of Section 8(a)(1) of the Act. General Counsel further urges the Board to issue a *Gissel* bargaining order as a measure necessary to remedy the unfair labor practices committed herein. Finally, General Counsel urges the Board to find the two derivative Section 8(a)(5) violations herein – unilateral action in eliminating the Lube Technician position and failure to furnish information, both of which are undisputed and admitted.

Dated at San Francisco, California, this 26th day of August, 2009.

/s/ David B. Reeves
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FORM NLRB-877
(4-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEVENS CREEK CHRYSLER JEEP DODGE, INC.

and

MACHINISTS DISTRICT LODGE 190, MACHINISTS AUTOMOTIVE LOCAL 1101, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS OF AMERICA, AFL-CIO

Case Nos. 20-CA-33367
20-CA-33562
20-CA-33603
20-CA-33655

DATE OF MAILING August 26, 2009

AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE
and
GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document*(s)* by electronic mail in pdf format, upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me on	DESIGNATED AGENT
August 26, 2009	**/s/ Susie Louie** **NATIONAL LABOR RELATIONS BOARD**

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August 26, 2009	**/s/ Susie Louie** **NATIONAL LABOR RELATIONS BOARD**